Office - Supreme Court, U. S.
FILED
DEC 27 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945

No. 632

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Petitioner,

vs.

A. T. SCHORB,
Respondent.

## RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI

WILLIAM H. DEPARCQ,
2535 Rand Tower,
Minneapolis 2, Minnesota,
Attorney for Respondent.

Of Counsel:
ROBT. J. McDONALD,
DONALD T. BARBEAU,
2535 Rand Tower,
Minneapolis 2, Minnesota.

HARVEY B. COX,
St. Louis, Missouri.

Hayward-Court Brief Printing Co., Minneapolis 15, Minn.

## INDEX


| | Page |
|---|---|
| I. Preliminary Statement | 1 |
| II. Statement of Facts | 2 |
| III. Points and Authorities | 8 |
| IV. Argument | 10 |
| The trial court properly submitted the case to the jury and the evidence is sufficient to sustain the verdict | 10 |
| 1. The petitioner owed respondent the duty to furnish a reasonably safe place to work | 10 |
| 2. An evidentiary custom need not be pleaded | 11 |
| 3. The question of whether excessive speed proximately caused the accident was for the jury | 15 |
| V. Conclusion | 23 |


## CASES CITED


American Car & Foundry Co. v. Uss, 211 F. 862 ..... 9
Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 S. Ct. 1062 ..... 8, 10, 11, 18
Blair v. Baltimore & Ohio R. Co., ... U. S. ..., 65 S. Ct. 545 ..... 10, 18
Brum v. Wabash R. Co., 335 Mo. 876, 74 S. W. (2d) 566 ..... 11
Chesapeake & Ohio R. Co. v. Mihas, 280 U. S. 102, 50 S. Ct. 42 ..... 19, 20, 21
Chicago Great Western Ry. Co. v. Egan, 159 F. 40 ..... 9
Chicago Great Western Ry. Co. v. Minneapolis, St. P. & S. S. M. R. Co., 176 F. 237 ..... 9, 12
Chicago Great Western Ry. Co. v. Beecher, decided July 23, 1945, reported in 150 F. (2d) 394 ..... 13
Chicago, St. P., M. & O. Ry. Co. v. Kulp (8th Cir.), 102 F. (2d) 352, 133 A. L. R. 1445 ..... 14
Dunagan v. Appalachian Power Co., 33 F. (2d) 876 ..... 9
Elmer v. Mutual S. S. Co., 114 Minn. 257, 130 N. W. 1104 ..... 8, 13
Glantz v. C., B. & Q. R. Co., 90 Neb. 606, 134 N. W. 242 ..... 9, 15
Goslin v. Kurn, 351 Mo. 395, 173 S. W. (2d) 79 ..... 9, 11, 14, 15
Halges v. Central R. Co. of N. J., 58 F. (2d) 169, cert. den. 287 U. S. 607 ..... 10, 19
Hogan v. Fleming, 317 Mo. 524, 297 S. W. 404 ..... 9, 13
In re Bowling Green Milling Co., 132 F. (2d) 279 ..... 15
Jacob v. City of New York, 315 U. S. 762, 62 S. Ct. 854 ..... 18
Kurn v. Stanfield (8th Cir.), 111 F. (2d) 469 ..... 10, 19
Lowden v. Hanson (8th Cir.), 134 F. (2d) 348 ..... 8, 11
McComb v. Atchison, T. & S. F. Ry. Co., 110 Cal. App. 303, 294 Pac. 81, cert. den. 283 U. S. 838, 51 S. Ct. 486 ..... 9, 15
Myers v. Pittsburgh Coal Co., 233 U. S. 184 ..... 8, 11
New York Central R. Co. v. Devine, 23 F. (2d) 588 ..... 10, 19
Owens v. Union Pacific R. Co., 319 U. S. 715, 63 S. Ct. 1271 ..... 10, 18
Palmer, et al., v. Hoffman, 318 U. S. 109, 63 S. Ct. 477 ..... 13
Parker v. Cushman, 195 F. 715 ..... 9

Page
Payne v. Connor, 274 F. 497 ..... 10, 19
Payne v. Connor, 274 F. 497 ..... 19
Sears Roebuck & Co. v. Peterson, 76 F. (2d) 243 ..... 22
Sickelco v. Union Pacific R. Co., 111 F. (2d) 746 ..... 15
Silver Falls Timber Co. v. Eastern & Western Lumber Co., 149 Ore. 126, 40 Pac. (2d) 703 ..... 15
Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409 .. 10, 17, 18
Terminal R. Assn. v. Farris, 69 F. (2d) 779, 785 ..... 22
Texas & Pacific R. Co. v. Behymer, 189 U. S. 468, 23 S. Ct. 622, 68 A. L. R. 1400 ..... 9, 11
Tiller v. Atlantic Coastline R. Co., 318 U. S. 54, 63 S. Ct. 444 .... 10, 18
Timmermann v. St. Louis Architectural Iron Co., 318 Mo. 421, 1 S. W. (2d) 791 ..... 9, 12, 13
Vogel v. St. Louis Merchants Bridge Terminal Ry. Co. (Mo. App.), 16 S. W. (2d) 624 ..... 13
White's Admr. v. Kentucky Public Elevator Co., 186 Ky. 91, 216 S. W. 837 ..... 9, 13, 15

TEXTS CITED

38 Am. Jur., Sec. 317, p. 1016 ..... 9, 13
25 C. J. S., "Customs and Usages," Sec. 32 ..... 9, 12
Wigmore, Evidence, Sec. 2053 ..... 9

STATUTES CITED

Rule 43 (a) of the Rules of Civil Procedure ..... 13

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945

No. 632

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Petitioner,

vs.

A. T. SCHORB, Respondent.

## RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI

### I.

### PRELIMINARY STATEMENT

(Figures in parentheses refer to pages of the record.)

This is a petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above case on October 19th, 1945, with a rehearing denied on November 7th, 1945. The opinion in the Circuit Court of Appeals is reported in 151 F. (2d) 361.

The absence of any attempt in petitioner's brief to review the evidence fairly and impartially necessitates an additional statement which, avoiding repetition, will be supplementary only. Petitioner's brief is characterized by an omission of vital and determinative facts; only the evidence favorable to the petitioner has been selected for emphasis. Conflicting evidence has been ignored.

The sole question is, was the evidence sufficient to permit a jury finding that petitioner's negligence in kicking the cars at an excessive speed proximately contributed to cause the accident? Convinced that there was an abundance of such evidence, we will address ourselves to that sole proposition, but to determine the propriety of the speed the entire factual background must be considered. Construed favorably to respondent the evidence presented the following picture:

## II.

## STATEMENT OF FACTS

A perusal of the plat (Resp.'s Ex. 11, 129) will aid the court in understanding the *locus in quo*. Cabin 1 consisted of the yard master's office or shanty and the yard clerk who had charge of the bills was located there (86). It was necessary for employees, especially switch foremen, to cross the tracks to cabin 1 continuously all day long in order to obtain instructions and to get the bills (96). At the time of the accident a larger and newer yard office was being constructed which, after its completion and as it existed at the time of the trial, appears in Petitioner's Exhibit 3 (175). However, at the time of the accident the new construction was under way (86).

The yard office, or cabin 1, had been moved northerly and was at the place on the plat designated as, "Cabin 1, temporary location" (68). It was located immediately adjacent to track 17, which was the first of the seven eastbound receiving tracks. All the tracks extended in a general northerly and southerly direction. The first track adjacent to cabin 1 was 17 and the second track was number 18, which was immediately involved in the accident.

West and slightly to the south of cabin 1 there appears upon the plat a rectangle with a capital "B," which indicates the position of the Burlington car which struck re-

spondent. It will be noted that this car is immediately north of one frog and immediately south of another and also on a curve. It was not intended to leave it there, because it was "on the frog" or "frogged," and was fouling tracks 17, 18 and 19 so that none of them could be used with the standing car in that position (101). As counsel said, "It gummed up the works" (102). When kicked, it had failed to roll far enough to clear the frogs and the switches.

It appeared without dispute that switchmen would be crossing these three tracks all day long on their way to and from cabin 1 (96). These tracks were known as receiving tracks as distinguished from classification tracks. Ordinarily cars and trains would be taken in on those tracks and removed from them under engine control (16) and they would be used to switch and classify cars very seldom (17). Sometimes there would be months when they would not kick a car in there (51) and maybe the next week they would push a car in there and then for months they would not put cars in there (51). Cars would sometimes be kicked onto these tracks but very seldom (61). Respondent did not expect any cars to go in on 18 (100). They could not be called open tracks (62).

Tracks 17, 18 and 19 were used occasionally for kicking a car (17), but there was a usual and customary speed for this movement of from 3½ to 5 or 6 miles an hour (18) and it should be held down to that (27). It is different on a classification track where they switch faster (27, 28). They would not kick them on track 18 at the same rate of speed as on the classification track (23). Tracks 17, 18 and 19 were a little down hill and the cars should be kicked in about at the speed you could walk—three to five miles an hour—and they were customarily kicked slower on those tracks than at other points (55). The accident occurred about 10:18 A. M. on September 11th, 1943. Respondent was switch fore-

man on the ice house job. After completing his work he returned with his engine heading southerly on the track known as the easy way to the ice house.

The engine stopped northwesterly of cabin 1 (84, 85). Respondent, intending to go to the yard office for further instructions, met Mr. Seibert, the yard master, and held a conversation with him at approximately the point marked with the circle and the "X" inside (Resp.'s Ex. 11, 129). Seibert and respondent were standing west of the center of the Burlington car and about 30 feet away from it. The yard master instructed respondent to take care of the L. & N. track and stated, "Go to the shanty and get your bills and get out with one track L. & N." (86). Respondent answered, "I will get my bills while I am stopped" (105). The time was short and respondent had a spare minute and went to get the bills (96).

He walked northeasterly toward the Burlington car (86). He looked down the lead and noticed that the 18 switch was not open (87). When he was about 10 feet south of the north end of the Burlington car and 3 feet west of it, he looked down south toward the lead and toward old cabin 1 and could see 18 switch or 17 lead switch, the master switch (97), which is the switch where 17, 18 and 19 started, and the switches were all lined down the lead (98). The lead is track 39-40, which is east of the place where Seibert and respondent had been standing (Resp.'s Ex. 11, 129).

Respondent saw cars down the lead south of 19 switch, between cabin 1 and the B. & O. crossing, but did not know whether they were moving or standing still (98). He then walked northerly until he was about 10 feet north of the Burlington car (86, 87). A ten-foot clearance would give you plenty of time to get out of the way with a minor impact at 3, 4 or 5 miles an hour (87, 88). The company rule provides that men should walk "a sufficient distance beyond the end

of such cars to protect against movement from other end" (30). Experienced switchmen regard eight or ten feet as sufficient clearance for a movement from 3½ to 6 miles an hour (27, 28); the customary clearance where respondent was injured at a normal rate of speed would be "possibly eight to ten feet, twelve" (21).

When about ten or twelve feet north of the Burlington car (99), he then turned and started east across track 18 (99). He again looked to the south but the Burlington car had his view blocked (99). He didn't know there was anything coming from that direction (99). When he was midway between the rails, Seibert hollered, "Oh, Al" (100), and respondent kind of turned to the south and at the same time there was a terrific crash (100). The car jumped or leaped up (86, 87); the impact was great and unusual and violent (88); the witness Sauerhage from 275 feet away saw the whole car jump off the rails (78).

Respondent testified that when he swung around he was hit in the snap of his fingers (87, 88) and that he was struck in the chest by the drawbar and knocked onto his back (101). A car and a half leaped over his body and after they slowed he grabbed onto the underrigging and held on and was dragged (86, 87). The crash was so sudden he could not get out of the way (87). He said it was a terrific crash (100) and the noise came and his body was struck all at the same time (101). He was rolled under the cars like a rubber ball (101). The cars leaped up and the next thing respondent heard was the bump on the ground and he was rolling underneath (100). Respondent testified that he did not expect the cars (100) and that during his twenty-two years of experience he had never seen a car hit that hard at that point (88).

The witness Butler threw the switches and saw the cars pass right in front of him (49). He said they were going

at a pretty good rate of speed, nothing unusual about the speed, but he wouldn't want to get on them and they were going plenty fast, faster than he could walk (49). He couldn't remember whether he had ever observed cars kicked in on those receiving tracks as fast as it was done on this occasion (56).

Tunze, a switchman, was about 200 feet away and was attracted by the impact (59) which he said was a louder one than they were used to hearing (60). He described the movement itself as not a usual movement (61).

Sauerhage was the pin puller who cut the cars off and he placed their speed between 12 and 15 miles per hour (72). The track had some gravity and when they struck the Burlington car they were also going between 12 and 15 miles an hour (72). He watched the cars until the impact when the Burlington car raised up in front, "jumped" (72). He would call it a pretty abnormal impact (72). In view of the fact that these three cars were cut off 150 feet from the Burlington car, he would say, at that close distance, the speed was unusual (72, 73).

The Burlington car which was standing on the curve and the frog was loaded with merchandise weighing 9,369 pounds (66). The three cars kicked in were: A Milwaukee car loaded with 82,400 pounds, a Northern Pacific car loaded with 78,100 pounds, and an L. & N. car which was empty (66). When the collision occurred, the Burlington car was derailed and ran along the ties and the roadbed 115 feet before coming to a stop (59). It rolled in a derailed condition for from 115 to 120 feet (73). The northwest wheel went plumb off on the ground and travelled 70 feet on the ground (80, 81). The roadbed was tore up quite a bit and a pretty good stretch of it was torn up (50). Generally cars are not kicked hard enough to derail another car (32).

George C. Seibert testified for petitioner. He was in charge

of the entire yard and issued all instructions to assistant yard masters, foremen, inspectors, and all employees in the yard (137). He had charge of all incoming and outbound trains, the inspection of cars and their switching (137). He had twenty-five years of experience (131). He testified that after respondent turned and walked toward the yard shanty, he directed his attention elsewhere (138) until he just happened to turn and see respondent in the middle of the track; he called, "Oh, Al," but it was too late (138, 139). He did not dispute the respondent with reference to his route or position or purpose (138, 139). He actually saw the accident, that is, the collision (139). When asked whether the cars were going 12 to 15 miles per hour, he said they were not moving at such a high rate of speed (139). He refused to fix the position of the cars (141), but was impeached by his deposition wherein he stated that his best estimation was 3½ to 5 miles per hour, that this was the proper and normal speed, that it was the usual and customary speed, and that 3½ to 5 miles an hour was the speed they should have been going (142). He admitted that the above answers in his deposition were true and correct (142). He admitted also that when his deposition was taken he had testified that as the general yard master, he would say that the highest speed, under good railroad practice and under the circumstances existing, that they should have been kicked with safety, was about 3 to 3½ miles per hour (143). He admitted that this was true but said that by "safety" he was referring to lading (133, 134).

He testified that 15 to 16 miles an hour would be dangerous to equipment and property but not to persons around (144, 145). He admitted that such a speed might derail a car (144). He further admitted that the Burlington car actually "leaped," but claimed it did not derail until it rolled 15 or 16 feet from where it was standing (145).

When Sauerhage pulled the pin, the cars were just barely moving (74). The practice is for the pin puller to pull the pin when the slack is bunched and the cars start to move. When the desired speed is attained, the foreman or some other switchman then signals the engineer to stop. When the engineer stops the disconnected cars roll away on their own momentum. When the three cars were separated at a speed of from 12 to 15 miles per hour (72), they were only about 150 to 175 feet from the Burlington car (75).

Although Mr. Klein investigated the accident and interviewed the various witnesses (186), yet petitioner presented no explanation for the derailment and the record is devoid of any enlightenment on the subject except the claim of respondent that it must have been the result of impact that was exceptionally hard (170). The only direct testimony on the subject was that of Sauerhage who said that the whole car jumped and that the derailment occurred immediately as soon as the car was hit (78).

No witness, although two or three actually saw the accident, testified that respondent did not allow the customary clearance required by rule and practice in crossing the track near a standing car.

## III.

## POINTS AND AUTHORITIES

1. The petitioner owed respondent the duty to furnish a reasonably safe place to work.

*Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, 63 S. Ct. 1062.

*Myers v. Pittsburgh Coal Co.*, 233 U. S. 184.

*Lowden v. Hanson* (8 Cir.), 134 F. (2d) 348.

2. Evidence of custom and practice was admissible.

*Texas & Pacific R. Co. v. Behymer,* 189 U. S. 468, 23 S. Ct. 622, 68 A. L. R. 1400.

*Dunagan v. Appalachian Power Co.,* 33 F. (2d) 876.

*Elmer v. Mutual S. S. Co.,* 114 Minn. 257, 130 N. W. 1104.

38 *Am. Jur.,* Sec. 317, p 1016.

An evidentiary custom need not be pleaded.

*Timmermann v. St. Louis Architectural Iron Co.,* 318 Mo. 421, 1 S. W. (2d) 791.

*Hogan v. Fleming,* 317 Mo. 524, 297 S. W. 404.

25 *C. J. S.,* "*Customs and Usages,*" Sec. 32.

The testimony of one witness is sufficient to establish an evidentiary custom.

*Goslin v. Kurn,* 351 Mo. 395, 173 S. W. (2d) 79.

*McComb v. Atchison, T. & S. F. Ry. Co.,* 110 Cal. App. 303, 294 Pac. 81, cert. den. 283 U. S. 838, 51 S. Ct. 486.

*Glantz v. C., B. & Q. R. Co.,* 90 Neb. 606, 134 N. W. 242.

*Wigmore, Evidence,* Sec. 2053.

There is an important distinction between a binding custom which constitutes a usage of trade and an industrial practice which is admissible in evidence as evidentiary of negligence.

*White's Admr. v. Kentucky Public Elevator Co.,* 186 Ky. 91, 216 S. W. 837.

*Chicago Great Western Ry. Co. v. Egan,* 159 F. 40.

*Parker v. Cushman,* 195 F. 715.

*American Car & Foundry Co. v. Uss,* 211 F. 862.

*Chicago Great Western Ry. Co. v. Minneapolis, St. P. & S. S. M. R. Co.,* 176 F. 237.

*Texas & Pacific R. Co. v. Behymer, supra.*

3. The evidence was sufficient to make the question of excessive speed one for the jury.

*Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, 63 S. Ct. 444.

*Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, 63 S. Ct. 1062.

*Owens v. Union Pacific R. Co.*, 319 U. S. 715, 63 S. Ct. 1271.

*Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409.

*Blair v. Baltimore & Ohio R. Co.*, ... U. S. ..., 65 S. Ct. 545.

In analogous cases recovery has been sustained on the ground of excessive speed.

*Kurn v. Stanfield* (8 Cir.), 111 F. (2d) 469.

*Halges v. Central R. Co. of N. J.*, 58 F. (2d) 169, cert. den. 287 U. S. 607.

*New York Central R. Co. v. Devine*, 23 F. (2d) 588.

*Payne v. Connor*, 274 F. 497.

## IV.

## ARGUMENT

### The Trial Court Properly Submitted the Case to the Jury and the Evidence Is Sufficient to Sustain the Verdict.

Citation of authority is unnecessary for the elementary propositions that the weight and credibility of the testimony are for the jury, that conflicts in evidence should be resolved in favor of the respondent, and the evidence is to be viewed in its aspects favorable to the respondent's case.

**1. The petitioner owed respondent the duty to furnish a reasonably safe place to work.**

It is the duty of a railroad company to furnish to its employees a reasonably safe place in which to do their work.

This duty is a continuing one and is non-delegable and extends to all places where the employee may reasonably be expected to go in the course of his work.

The most recent expression of the general principle applicable here was by the Supreme Court in the case of *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, 63 S. Ct. 1062, wherein the court said:

> "At common law the duty of the employer to use reasonable care in furnishing his employes with a safe place to work was plain. That rule is deeply engrained in federal jurisprudence. * * * That duty of the carrier is a 'continuing one' (*Kreigh v. Westinghouse C. K. & Co., supra*, 214 U. S., page 256, 53 L. Ed. 984) from which the carrier is not relieved by the fact that the employe's work at the place in question is fleeting or infrequent."

The above quoted rule represents the overwhelming weight of authority in the federal courts and the courts of Missouri are committed to the same proposition. *Myers v. Pittsburgh Coal Co.*, 233 U. S. 184; *Lowden v. Hanson*, 134 F. (2d) 348; *Goslin v. Kurn*, 351 Mo. 395, 173 S. W. (2d) 79; *Brum v. Wabash R. Co.*, 335 Mo. 876, 74 S. W. (2d) 566.

**2. An evidentiary custom need not be pleaded.**

The general principle applicable here was well expressed in *Texas & Pacific R. Co. v. Behymer*, 189 U. S. 468, 23 S. Ct. 622, as follows:

> "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

It was not necessary for respondent to plead that there was a custom as to the speed in switching cars in order to prove such a fact. The ultimate fact to be proved was that of negligence and evidence of a departure from the usual and

customary speed merely tended to prove the ultimate fact pleaded.

The rule is stated in 25 *C. J. S., "Customs and Usages,"* Sec. 32, that:

> "Where a custom or usage is relied upon evidentially and only as evidence of some other fact in issue, it need not be pleaded"

In *Chicago Great Western Ry. Co. v. Minneapolis, St. Paul & S. S. M. R. Co.,* 176 F. 237, 20 Ann. Cas. 1200, the Eighth Circuit Court of Appeals held that in the case of a doubtful act, evidence of the ordinary practice and usual custom of ordinarily prudent persons under similar circumstances is admissible on the issue of negligence in the performance or omission of the act. The court, 176 F., at page 242, said:

> "The presumption was, as has already been said, that these operators were of ordinary intelligence and prudence. The best test of reasonable care in a given case is evidence of the degree of care which such persons commonly exercise under similar circumstances where such evidence is available. Hence, upon the question of negligence or none, evidence of the ordinary practice and of the uniform custom, if any, of such persons in the performance under similar circumstances of acts like those which are alleged to have been done negligently, is generally competent evidence, because it presents to the jury a correct standard for the determination of the issue."

The Supreme Court of Missouri in *Timmermann v. St. Louis Architectural Iron Co.,* 318 Mo. 421, 1 S. W. (2d) 791, said:

> "The failure to submit the question of existence of a custom to brace the beam was not a fatal infirmity for still another reason. The existence of the custom was not a substantive part of plaintiff's cause of action. In the opinion in the very recently decided case of *Hogan v. Fleming* (Mo. Sup.), 297 S. W. loc. cit. 408, it was said:
>
> "'It has been ruled in this state that, inasmuch as

custom is not substantive in character, but merely evidentiary of defendant's negligence, it is not necessary that such custom shall be pleaded.'

"Numerous cases are cited supporting that utterance, among them *Brunke v. Telephone Co.*, 115 Mo. App. 36, 90 S. W. 953; *Caldwell v. Payne* (Mo. Sup.), 246 S. W. 312; *Gordon v. Kansas City R. Co.*, 222 Mo. 516, 536, 121 S. W. 80; *Cassin v. Lusk*, 227 Mo. 663, 678, 210 S. W. 902. The custom, as indicative of the conduct of prudent men, was probative in character, but it did not supplant or change the rule of negligence established by substantive law. It was not necessary that it be submitted as a hypothetical fact."

To exactly the same effect, in addition to the authorities cited in the *Timmermann* case, *supra*, see *Hogan v. Fleming*, 317 Mo. 524, 297 S. W. 404; *Vogel v. St. Louis Merchants Bridge Terminal Ry. Co.* (Mo. App.), 16 S. W. (2d) 624; *Elmer v. Mutual S. S. Co.*, 114 Minn. 257, 130 N. W. 1104; *White's Admr. v. Kentucky Public Elevator Co.*, 186 Ky. 91, 216 S. W. 837; and 38 *Am. Jur.*, Sec. 317, p. 1016. It may be noted that in *Hogan v. Fleming, supra*, suit was brought for personal injuries and the plaintiff was allowed to show a custom as to the stopping of street cars. Defendant's contention that because the custom was not pleaded the evidence was inadmissible was rejected by the Supreme Court of Missouri.

Under Rule 43 (a) of the Rules of Civil Procedure, the admissibility of evidence is governed by the rule applied in the federal courts or in the courts of the state in which the federal court sits, whichever favors its reception. Rule 43 (a) has been followed and applied by the Eighth Circuit Court of Appeals in *Chicago Great Western Ry. Co. v. Beecher*, decided July 23rd, 1945, and reported in 150 F. (2d) 394, and also by the Supreme Court of the United States in *Palmer, et al., v. Hoffman*, 318 U. S. 109, 63 S. Ct. 477.

Considering the evidence in the light most favorable to respondent, it was more than sufficient to establish the usual and customary speed used in switching cars in the yard and on the track in question. Rollie T. Brown, one of petitioner's switchmen, testified the usual and customary speed of switching movements on these receiving tracks should be 3½ to 5 or 6 miles an hour (18, 27). Respondent testified to the same effect (87, 88). George C. Seibert, petitioner's yard master for the entire yard, testified in his deposition that the proper and normal and customary speed would be from 3½ to 5 miles per hour and that this was the speed they should have been going (142). He further said that the highest speed they should have been kicked with safety was about 3 to 3½ miles per hour (142, 143).

The testimony of Seibert was substantive evidence under the rule established in the leading case of *Chicago, St. P., M. & O. Ry. Co. v. Kulp* (8 Cir.), 102 F. (2d) 352, 133 A. L. R. 1445.

The evidence of one witness alone is sufficient to prove a custom. In the recent case of *Goslin v. Kurn,* 351 Mo. 395, 173 S. W. (2d) 79, plaintiff attempted to prove that defendant failed to dim a headlight in violation of a custom to dim headlights in the yards. As to the custom plaintiff testified that "quite a few" of the road engines dimmed their headlights in the yards, but he did not know what percentage. Plaintiff was the sole witness to testify as to such custom and he was impeached to a certain extent by a statement he had given a claim agent for defendant. In holding there was sufficient evidence to establish a custom, the court said:

> "In former days it was held by a few courts that one witness was not enough to establish the existence of a custom, but it is now well settled that a custom may be proved as any other fact."

The evidence in the Goslin case falls far short of that produced in the case at bar. There the sole witness stating

there was a custom was the plaintiff and he was impeached both by his statement and on his cross examination. In the case at bar the custom was established by respondent and by at least two of petitioner's employees. None of their testimony as to custom was impeached.

To the same effect as the rule in the *Goslin* case, see *McComb v. Atchison, T. & S. F. Ry. Co.*, 110 Cal. App. 303, 294 Pac. 81, cert. den. 283 U. S. 838, 51 S. Ct. 486; *Dean Wigmore, Evidence*, Sec. 2053; *Glantz v. Chicago, B. & Q. R. Co.*, 90 Neb. 606, 134 N. W. 242; and *Silver Falls Timber Co. v. Eastern & Western Lumber Co.*, 149 Ore. 126, 40 Pac. (2d) 703.

Cases such as *Sickelco v. Union Pacific R. Co.*, 111 F. (2d) 746, and *In re Bowling Green Milling Co.*, 132 F. (2d) 279, relied on by petitioner are cases wherein a custom was relied on as constituting a part of a contractual obligation or as a trade usage and are not authority for the proposition advanced by petitioner in this case. The true distinction was pointed out in *White's Admr. v. Kentucky Public Elevator Co.*, 186 Ky. 91, 216 S. W. 837, where the court said:

> "The rule requiring a custom to be pleaded before it may be shown in evidence applies where there is an effort to incorporate into a contract a local custom as a binding stipulation between the parties * * *, but has no application where the purpose is, as here, to prove the ordinary and usual way commonly employed to do a certain thing in order to determine whether or not it has been negligently done."

**3. The question of whether excessive speed proximately caused the accident was for the jury.**

A study of the evidence produced on the trial conclusively shows that the negligent and excessive speed with which petitioner's cars were kicked was the proximate cause of respondent's injuries. It appeared without dispute that the

switchmen, including respondent, would be crossing the tracks all day long on their way to and from cabin 1 (96). These tracks were known as receiving tracks as distinguished from classification tracks. They were seldom used to switch and classify cars (17). It was necessary for respondent to cross these tracks continually throughout the day to receive his orders. Respondent did not expect any cars to go in on 18 (100). It was testified that the usual and customary speed for this movement was from 3½ to 5 or 6 miles an hour (18). Respondent was crossing the yards to go to the yard office for further instructions. He met Mr. Seibert, the yard master, and held a conversation with him (129). After respondent received his orders he walked northeasterly toward the Burlington car (86). He looked down the lead and noticed that the 18 switch was not open (87). He gave himself a ten-foot clearance while walking north of the Burlington car (87, 88). He testified that with a ten-foot clearance you would have plenty of time to get out of the way with a minor impact of 3, 4 or 5 miles an hour (87, 88). It was undisputed that experienced switchmen regard eight or ten feet as sufficient clearance for a movement from 3½ to 6 miles an hour (27, 28) and that this was the customary clearance (21). While respondent was midway between the rails there was a terrific crash (100). The car jumped or leaped up (86, 87); the impact was great and unusual and violent (88); the witness Sauerhage from 275 feet away saw the whole car jump off the rails (78).

Respondent testified that during his twenty-two years of experience he had never seen a car hit that hard at that point (88).

When the collision occurred, the Burlington car was derailed and ran along the ties and the roadbed 115 feet before coming to a stop (59). It rolled in a derailed condition for from 115 to 120 feet (73).

Petitioner presented no explanation for the derailment and the record is devoid of any enlightenment on the subject, except the claim of respondent that it must have been the result of an impact that was exceptionally hard (170). The only direct testimony on the subject was that of Sauerhage who said that the whole car jumped and that the derailment occurred immediately as soon as the car was hit (78). No witnesses were produced by petitioner who testified to the effect that respondent did not allow the customary clearance required by rule and practice in crossing a track near a standing car.

Considering the evidence in the light most favorable to respondent, the conclusion is inescapable that the accident would not have occurred had not the petitioner shunted in the cars at a negligent and excessive rate of speed. Had the cars been kicked in at the usual and customary speed of 3½ to 5 or 6 miles an hour, the respondent would have had plenty of time to step out of the way of the Burlington car. Respondent was crossing these tracks all day and relied on the petitioner to perform its duties in the usual and customary manner. He knew that cars were not kicked in on these receiving tracks at a high rate of speed and under those circumstances allowed himself all the leeway that was necessary. It is clear that on the undisputed evidence the question of petitioner's negligence and the question of proximate cause were for the jury and the verdict of the jury should not be disturbed. As said in the case of *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence

> and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * (Citing cases.) * * * *That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*" (Italics ours.)

In a series of recent decisions the Supreme Court of the United States has emphatically disapproved the practice of directing verdicts in F. E. L. A. cases. That court has held that questions of negligence should almost invariably be submitted to juries in this type of litigation, and that under no circumstances should the courts deprive the injured employee of a jury trial in a "close or doubtful case." The modern trend was initiated by the *Tiller* case, *post*, and the latest utterance was in the *Blair* case, *infra*. *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, 67, 63 S. Ct. 444; *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062; *Owens v. Union Pacific R. Co.*, 319 U. S. 715, 63 S. Ct. 1271; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409; *Blair v. Baltimore & Ohio R. Co.*, ... U. S. ..., 65 S. Ct. 545; *Jacob v. City of New York*, 315 U. S. 762, 62 S. Ct. 854.

In the *Tiller* case, *supra*, the deceased was struck by a railroad car at night and killed. The accident happened on a dark night and the deceased was killed by the rear end of a train backing up. The accident happened in a yard. No warning was given. The court said:

> "We cannot say that a jury could not reasonably find negligence from the evidence which showed such an unprecedented departure from the usual custom and practice in backing cars without giving 'adequate warning of movement.'"

In the case at bar, also, the speed was unprecedented. In his twenty-two years of experience, the respondent had seen nothing like it and other witnesses testified that it should have been from 3½ to 5 miles an hour, whereas, on the testimony of the switchman who made the cut and separated the cars, it was actually from 12 to 15 miles per hour (72).

In analogous cases recovery has been sustained on the ground of excessive speed. See *Kurn v. Stanfield* (8 Cir.), 111 F. (2d) 469; *Payne v. Connor,* 274 F. 497; *New York Central R. Co. v. Devine,* 23 F. (2d) 588; *Halges v. Central R. Co. of N. J.,* 58 F. (2d) 169, cert. den. 287 U. S. 607.

In the *Kurn* case, *supra,* where an employee was struck and run over while crossing the track, decided before the *Tiller* case, the Circuit Court of Appeals rejected a contention similar to that advanced by petitioner here. There as here the petitioner relied upon the *Mihas* case, which will be distinguished later in this brief. The Circuit Court, however, held that the doctrine of the *Mihas* case could have no application where the railroad company either by rule or by practice had set up some standard upon which employees could justifiably rely, and said:

> "It is true that railroad employes, particularly those working in yards, must as a part of their duty exercise due care for their own safety. But employes are entitled to rely upon rules and customs which determine the standards of what they must anticipate."

In the case of *Payne v. Connor, supra,* plaintiff while crossing the tracks was struck by a cut of cars which had been put in motion by being struck by four kicked cars. There was evidence that the kicked cars were moving at a speed of from 10 to 15 miles an hour and that while defendant had no rules limiting the speed, the usual and reasonable speed was from 4 to 6 miles an hour. The court, in discussing the question of insufficient brakes and speed, stated:

> "But if it be assumed that the insufficient brakes upon the cars in no way contributed to the plaintiff's injury, and that the sole cause was the excessive speed at which they were kicked upon the still cars, it cannot be said, as a matter of law, that the plaintiff assumed the risk of injury from such a source of danger, for the evidence shows that the act of kicking cars at such a rate of speed into still cars was an unusual occurrence, a departure from the ordinary conduct of the business, so that the question, in any view of the case, was one for the jury to pass upon."

In its attempt to escape petitioner contends that the usual and customary switching speed on the receiving track (3½ to 6 miles per hour) was designed solely to protect rolling stock and lading. It would be a strange system of jurisprudence, indeed, that would sanction such an argument. Any speed sufficient to derail a car and tear up the roadbed would obviously be dangerous to the life and limb of any employee working in the immediate vicinity. A glance at the plat and the photographs will disclose that the tracks, switches and buildings are in close proximity to each other, and with employees required to cross the tracks continuously and to work on and about them, throwing switches, climbing cars, and passing to and from the various shanties and buildings, collisions and derailments must necessarily be extremely hazardous, not only to property, but to human life as well. The contention of petitioner is the very negation of that humanitarian philosophy which has been said by the courts to be the pervading spirit of the Federal Employers' Liability Act, which requires the company to be at least equally solicitous for the safety of its employees as for the preservation of its property.

Petitioner places its principal reliance upon *Chesapeake & Ohio R. Co. v. Mihas*, 280 U. S. 102, 50 S. Ct. 42. The doctrine of the *Mihas* case is inconsistent with that of the *Tiller, Owens, Bailey* and *Blair* cases, and it is noteworthy that *Chesapeake & Ohio R. Co. v. Mihas* has never been cited or

followed on the question of negligence by the Supreme Court of the United States.

However that may be, whether overruled or not, the facts render it distinguishable. It was tried and presented on an altogether different theory. The plaintiff in that case in order to get from his house on one side of the track to his speeder car upon the other attempted to climb over a coal car standing with a number of others. While he was doing so other cars were switched against the coal car, at 4 or 5 miles an hour, which was not unusual, and not as here at 12 to 15 miles an hour which was very unusual. There is no evidence in the *Mihas* case that the car was struck so violently as to derail it. Furthermore, the custom and practice relied upon in the *Mihas* case existed only in favor of a third party, not the plaintiff. Mihas relied upon a previous custom and practice to warn third persons engaged in unloading operations before moving the cars about which they were working. He did not claim there was any custom or practice to warn employees before striking such cars. Mihas was an employee and not a third party and thus failed to bring himself within the protected class to whom the duty was owing.

In the *Mihas* case the employee was crossing over the coal car and was not crossing the tracks at the place where they were openly, frequently, and notoriously used by employees all day long in coming from and going to the yard master's office. There was no evidence that the employees in charge of the switching crew could possibly have anticipated the presence of Mihas. In fact, the court said they had no reason to believe that Mihas might be in a position of danger, and added:

> "In the absence of such knowledge or ground for belief, they were not required to warn Mihas of the impending switching operation or take other steps to protect him."

In the case at bar it is undisputed that the receiving tracks in front of the yard shanty were used as a thoroughfare continually all day long, especially by switch foremen in getting their orders. In the *Mihas* case, the track involved was a switch track and not a receiving one, and in the *Mihas* case the custom or duty to warn was not owing to employees. In the case at bar the duty to warn, relied upon so heavily in the *Mihas* case, was not even submitted to the jury and is not really involved. Respondent here predicates his recovery upon excessive speed which was abundantly established. If anything else beside speed caused the derailment the record is barren of evidence on the subject. Petitioner could only suggest various theories such as the part of shoe or some other undiscoverable object. A close examination and inspection was made of the wheels, the rails, the roadbed, and other equipment, and with all of its experience and its investigation and its experts the petitioner offered no evidence on the subject. This court will not guess and speculate in petitioner's favor to find some cause it was unable to find by evidence. See *Terminal R. Assn. v. Farris*, 69 F. (2d) 779, 785; *Sears Roebuck & Co. v. Peterson*, 76 F. (2d) 243.

We shall not further waste the time of this court refuting the perfectly absurd contention that excessive speed and the attendant danger of derailment constituted a threat to equipment which should be avoided but not to human life. The F. E. L. A. imposes liability for "negligence." The duty to exercise ordinary and reasonable care is imposed thereby, custom or no custom. That respondent relied upon petitioner's performance of that duty appears sufficiently from his testimony that he allowed the usual and customary clearance of about ten feet (86, 87) because it would give you plenty of time to get out of the way with an impact at 3, 4 or 5 miles an hour (87-88). In the judgment of experienced switchmen

eight to ten feet was sufficient clearance to permit passage in safety in the event of a reasonably foreseeable impact at 3½ to 6 miles an hour (27, 28).

## V.

## CONCLUSION

A reversal of this case upon purely technical grounds would be a tragedy from the standpoint of respondent whose injuries were so serious and permanent that they were not questioned at any stage of the proceedings. The petition in this case is so wholly lacking in merit as to almost render suspect the motives of experienced counsel in taking it. We submit that in furtherance of justice this court should deny the petition for writ of certiorari and uphold the judgment of the court below.

Respectfully submitted,

WILLIAM H. DEPARCQ,
2535 Rand Tower,
Minneapolis 2, Minnesota,
Attorney for Respondent.

Of Counsel:
ROBT. J. McDONALD,
DONALD T. BARBEAU,
2535 Rand Tower,
Minneapolis 2, Minnesota.

HARVEY B. COX,
St. Louis, Missouri.